84-1531

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

ROBERT BERNARD JACKSON,
RESPONDENT

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

DID THE MICHIGAN SUPREME COURT INCORRECTLY HOLD THAT A STATEMENT GIVEN TO POLICE BY A DEFENDANT AFTER HE HAD BEEN ARRAIGNED ON A WARRANT AND AFTER HE WAS PROPERLY GIVEN THE MIRANDA REQUIRED WARNINGS, MUST BE SUPPRESSED BECAUSE COUNSEL WAS NOT PRESENT PRIOR TO THAT STATEMENT BEING GIVEN AND BECAUSE THE POLICE DID NOT ADVISE THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

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OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 114 Mich App 649 (1982); ___ NW2d ___ (1982). The Opinion of the Michigan Supreme Court is reported at 421 Mich 39 (1984); ___ NW2d ___ (1984).

STATEMENT OF JURISDICTION

The opinion of the Michigan Supreme Court was released on 28 January 1985. The jurisdiction of this Honorable Court is invoked under and pursuant to 28 USCA 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

ROBERT JACKSON was convicted of second degree murder and conspiracy to commit second degree murder. His conspiracy conviction was reversed on appeal by the Michigan Court of

Appeals but his substantive second degree murder conviction was affirmed. People v Jackson, 114 MichApp 649 (1982).

JACKSON gave a total of seven confessions after his arrest. Three on the day of his arrest, one the following day after failing a polygraph. A fifth and sixth statement were also then taken by the arresting officer. JACKSON was then arraigned on the Complaint and Warrant. The arraigning magistrate, ascertaining that JACKSON was indigent, agreed to appoint counsel for him. The final and seventh statement was taken the next day (taped). (See Appendix to Petition for Certiorari, pages 46-49, 91- 97).

The trial theory of the Petitioner was that the wife of the deceased hired Jackson and Knight to kill her husband to receive substantial insurance benefits.

SUMMARY OF ARGUMENT

Where a defendant specifically requests the assistance of counsel before talking to the police, interrogation must cease. Counsel must either be provided or the defendant must be shown to have both reinitiated contact and to have waived the presence of the earlier requested counsel. A mere assertion by a defendant at the arraignment on the complaint and warrant of a desire to have appointed defense counsel, although sufficient to cause the Sixth Amendment right to attach, is not a specific assertion of the right to the presence of counsel at all further police-defendant contacts.

Where a defendant, after arraignment on the Warrant and after having made a request for appointed counsel, has been fully advised of his Miranda rights and has decided to continue to cooperate with the police, the Miranda waiver fully protects whatever Sixth

Amendment counsel right the defendant may have. As noted by the Michigan Supreme Court, "the average person" is not generally sophisticated enough to recognize or understand the fine distinctions between Fifth and Sixth Amendment counsel rights. (Slip Opinion, 16). Thus, a Defendant's awareness of his Fifth Amendment right to counsel suffices in and of itself to protect his Sixth Amendment rights. The record in this case established both that JACKSON was repeatedly given his Miranda warnings and that he repeatedly waived the right to counsel enunciated in those warnings. The insertion of yet another layer of "official" advisement (and an unidentified advisement at that) would thus be totally meaningless. The Michigan Supreme Court did not set forth what additional warnings the police must provide after arraignment to obtain a "valid" Sixth Amendment waiver. Thus, the situation now obtains that not only do

the police not know how to advise a defendant after arraignment but, the defendant is recognized as being generally unable to understand that additional advice even if given.

ARGUMENT

THE MICHIGAN SUPREME COURT INCORRECTLY HELD THAT A STATEMENT GIVEN TO POLICE BY A DEFENDANT AFTER HE HAD BEEN ARRAIGNED ON A WARRANT AND AFTER HE WAS PROPERLY GIVEN THE MIRANDA REQUIRED WARNINGS, MUST BE SUPPRESSED BECAUSE COUNSEL WAS NOT PRESENT PRIOR TO THAT STATEMENT BEING GIVEN AND BECAUSE THE POLICE DID NOT ADVISE THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

The question presented in this case is simply this: where a defendant has been formally charged and arraigned on a warrant[1],

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[1] In Michigan a criminal defendant may have formal charges lodged against him in one of two ways. He may be indicited by a grand jury with criminal charges laid by the return of a true bill or he may be charged by the submission by the police of a request for a complaint and warrant to the local county prosecutor. Upon the submission of such a document, the county prosecutor reviews it and, if convinced that a crime has occurred and

has been repeatedly given the required Miranda warnings and has repeatedly waived his right to remain silent and his right to have an attorney present, does the giving of the Miranda warnings alone provide sufficient protection of his Sixth Amendment right to counsel and is his waiver of the Miranda advisements a sufficient waiver of his Sixth Amendment right to counsel?

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[1] that the named individual has probably committed it, formally recommends that a magistrate sign the complaint. If the magistrate signs the complaint, it then becomes a warrant. The accused is then brought before the magistrate and is arraigned on the warrant. At that time, he is told by the magistrate what he is charged with and is advised of his rights as a defendant. He is given his Miranda rights and, if indigent, the magistrate will order the appointment of counsel. The appointment of counsel takes place some time after the appointment is ordered and not at the time of the arraignment. It is this latter procedure which was used in this case. After a defendant is arraigned on the warrant, a preliminary examination is held within 12 days. If the defendant is bound over for trial at the conclusion of that examination, the warrant becomes the charging information and the defendant is then arraigned on that information.

The Michigan Supreme Court answered this question in the negative.

The Court found that the Sixth Amendment right was "considerably broader" than the Fifth Amendment right and that "(n)either the United States Supreme Court nor this court has delineated specific procedural requirements for waiver of the Sixth Amendment right to counsel". (App. to Cert. Pet., Page 57). The Court found that "no consistent approach to the waiver problem has emerged" (App. to Cert Pet., Page 75), and held that:

> We decline to follow the reasoning of those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a magistrate based solely on waivers of Miranda rights.
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> * * *
>
> We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only hold here that, at a minimum, the Edwards/Paintman rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been

> made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. (App. to Cert. Pet., Page 81-82, emphasis in original).

The Court found that JACKSON requested appointed counsel at the arraignment on the warrant only because he was "financially incapable of retaining an attorney" and was unwilling to represent himself" (App. to Cert. Pet., page 55), and held that the trial court was correct in its decision that JACKSON had never invoked his Fifth Amendment right to counsel prior to or after arraignment on the warrant and had waived that right to counsel after arraignment on the warrant.

The Petitioner admits that JACKSON'S Fifth Amendment right to be free from self-incrimination and the associated right to counsel had attached at the time his seventh confes-

sion was given. Miranda v Arizona, 384 US 436, 86 S.Ct. 1602, 16 LEd 2d 694 (1966); Edwards v Arizona, 451 US 477, 101 S.Ct. 1880, 68 LEd 2d 378 (1981). The Petitioner also admits that JACKSON'S Sixth Amendment right to counsel had attached at the arraignment on the warrant where he asserted indigency and requested the appointment of trial counsel. Estelle v Smith, 451 US 454, 101 S. Ct. 1866, 68 LEd 2d 359 (1981); Kirby v Illinois, 406 US 92 S.Ct. 682, 32 LEd 2d 411 (1972); United States v Gouveia, ___ US ___, 104 S.Ct. ___, 81 LEd 2d 146 (1984). The Petitioner denies however that the request for the appointment of counsel by JACKSON at his arraignment on the warrant was an assertion of his right to the present assistance of counsel or was an assertion of his desire not to be questioned further. The facts of this case affirmatively establish that JACKSON had no objection to further communications with

the police.[2]

The Petitioner also recognizes the fundamental difference between the interests protected by the Fifth Amendment versus the Sixth Amendment right to counsel. As noted in Estelle v Smith, supra, the primary purpose of the

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[2] As a review of the totality of the confession voluntariness hearing conducted by the trial court readily reveals, JACKSON clearly desired to converse with the police over the two day period involved here. The record reveals that he wanted to "feel out" the police in terms of what information they possessed, what he could possibly get from them in exchange for information possessed by him and, initially, tried to convince the pol- ice that only his co-defendants were involved in the killing. At one point, JACKSON even met with a co-defendant and attempted to con- vince him to cooperate with the police and provide information against the initiator of the scheme. JACKSON simply thought that he could trick the police into redirecting their attention from him to another and, when that failed, try to obtain a deal lessening the time he would serve if convicted. JACKSON'S actions reveal a man who, while he may have desired the assistance of an attorney at trial, was well aware of his right to counsel during interrogation but did not want such assistance.

Fifth Amendment is to secure to an in-custody accused the right not to be forced to incriminate himself. (371-372). See also Miranda, supra; Kirby, supra; Rhode Island v Innis, 446 US 291, 100 S.Ct. 1682, 64 LEd 2d 297 (1980); and Wyrick v Fields, 459 US 42, 103 S.Ct. 394, 74 LEd 2d 214 (1982), Justice Marshall in dissent at 222, Cert. Den. After Remand, ___ US ___, 104 S.Ct. 556, 78 L Ed2d 728 (1983). The "core purpose" of the right to counsel contained in the Sixth Amendment however, is the guarantee of the assistance of counsel at a trial "when the accused is confronted with both the intricacies of the law and the advocacy of the public prosecutor." Gouveia, supra, at 154, citing United States v Ash, 413 US 300, 93 S.Ct. 2568, 37 LEd 2d 619 (1973). Where a pre-trial Sixth Amendment right has been found to attach, it has been found to do so because "the accused [is] confronted, just as at trial, by the

procedural system, or by his expert adversary, or by both." (Gouveia, supra, at 155). The Sixth Amendment right to counsel was neither designed nor intended to cover situations involving "normal" pre-trial police-defendant interrogations.

The Michigan Supreme Court mixed Fifth and Sixth Amendment concerns and arrived at a new rule that serves only to inhibit routine and acceptable police investigatory practices while at the same time impinging on the ability and right of a defendant to communicate with the police after arraignment on the warrant.

FEDERAL AUTHORITIES

Federal courts have reached differing results where this question has been addressed. In United States v Satterfield, 558 F2d 655 (CA2-1976), the indicted defendant was arrested, and given his Miranda warnings, and made a statement. He was then taken to a U.S. At-

torney's office, re-Mirandaized, again made a statement, was then arraigned at which time he requested the appointment of counsel. The following day he was again given his Miranda warnings and gave a third statement. The Second Circuit held that unless the defendant had waived his Sixth Amendment rights, his confessions were inadmissible. The Court noted that the defendant was "distraught, weeping and obviously out of control". (657). Even were the statements voluntary under the Fifth Amendment, they were involuntary vis a vis the Sixth Amendment. The Court did not discuss the question of waiver under the Sixth Amendment, implying that were the defendant "not out of control", the valid Fifth Amendment waiver would have been sufficient to waive his Sixth Amendment rights.

That standard Miranda warnings can result in the waiver of Fifth and Sixth Amendment rights was made clear in a later Second Cir-

cuit Court case, United States v Lord, 565 F2d 831 (CA2-1977). In Lord, supra, the indicted but as yet unrepresented defendant:

> was orally advised of his Fifth and Sixth Amendment rights upon arrest. He read and signed the standard 'advice of rights' form and a waiver form. Unlike the defendant in United States v Satterfield, supra, Schwartz was not an individual "distraught, upset, weeping and obviously out of control" while in custody. (840).[3]

In Carvey v LeFevre, 611 F2d 19 (CA2-1979), the indicted defendant was met by a police officer and asked to talk about the incident of the indictment. While providing the Miranda warnings, the officer did not tell the defendant that he had already been indicted. The Court held that the indictment had established the attachment of the Sixth

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[3] If the "standard advice of rights form" signed by the defendant in Lord, supra, is anything like that used in Michigan, it contains an explicit statement that the defendant has the absolute right to the assistance and presence of counsel. (See United States v Woods, 613 F2d 629, 632-634 (CA6-1980).

right to counsel and that no waiver of that right had been shown. That finding was based on the officer not having told the defendant of the existance of the indictment. (Cf. United States v Payton, 615 F2d 922, 924 (CA1-1980), defendant told he was under indictment, given full Miranda warnings and then made incriminatory statements. Held to have waived Sixth Amendment rights.) While the Court did not accept the proposition that Miranda warnings were necessarily a sufficient waiver of Sixth Amendment rights it also did not rule that the Miranda warnings will never suffice to waive Sixth Amendment rights..

> What might suffice to comply with Miranda will not necessarily meet 'the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached.' (Emphasis added, 22.)

In United States v Mohabir, 624 F2d 1140 (CA2-1980) the Court asked, "under what circumstances [will] an indicted defendant be

deemed to have waived his right to counsel at [an] interrogation by a prosecutor." (1141).

After indictment but before securing counsel, Mohabir was interrogated by an Assistant U.S. Attorney who gave Mohabir a copy of the indictment and advised him of his Miranda rights. (1145). The defendant then answered every question posed and, in response to being asked if he wanted counsel appointed, answered "yes". The Court noted that there was no assertion that the statements were involuntary under the Fifth Amendment but held that "waivers of Sixth Amendment rights must be measured by a 'higher standard' than are waivers of Fifth Amendment rights." (1146).4

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4 This "higher standard" concept was based on a dissent authored by Judge Friendly in United States v Massimo, 432 F2d 324 (CA2-1970):

> Warnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendment strictures against testimonial compulsion would not necessarily meet what I regard as the higher stand-

The Mohabir Court held that an indictment was a "critical stage" and that special attention must be paid to making sure that the defendant was aware of his Sixth Amendment rights and of what he was waiving by continuing to talk to the interrogating U.S. Attorney. The Court specifically found that Mohabir "did not understand the gravity of his position". (1149). The Court then noted that notwithstanding the existance of this "critical stage":

> the government urges that a prosecutor in his own office, without any explanation to establish understanding of the Sixth Amendment right, may question an uncounselled, indicted defendant in order to obtain a confession of guilt, and may do so even after...the prosecutor knows counsel will be appointed by the court within the hour. (1151).

On these specific facts the Court found the Miranda warnings alone to be insufficient. The Court found that, "[s]ome additional indication was required that appellant understood the nature and importance of the Sixth Amendment right he was giving up." (1151).

In Blassingame v Estelle, 604 F2d 893 (CA5-1979), the defendant at arraignment, was advised by the magistrate of his right to counsel. The defendant requested that counsel be appointed for him, the magistrate so ordered. After the arraignment but before counsel was appointed, the defendant was interrogated by the police, was given his full Miranda warnings, indicated he understood them, and made a statement. Counsel sought to suppress that statement asserting as one basis

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4 ard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached....Indeed, in the case of a federal trial there would seem to be much ground for outlawing all statements resulting from post-arraignment or indictment interrogation ...in the absence of counsel when the questioning has no objective other than to establish the guilt of the accused, even if the Sixth Amendment does not require so much. (Emphasis added, 1174.)

that the defendant had requested counsel at the "magistrate's hearing", had not met with counsel prior to the interrogation, thus the statement could not be used as evidence.

The Fifth Circuit found that:

> the crucial inquiry is whether defendant asserted his right to counsel in such a manner that later police inquiry 'has impinged on the exercise of the suspect's continuing option to cut off the interview'. Nash v Estelle, 597 F2d 513, 519 (5th Cit. 1979)
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> Nash recognizes that some defendants may well wish to have an attorney to represent them in legal proceedings, yet wish to assist the investigation by talking to an investigating officer without an attorney present. 'While the suspect has an absolute right to terminate the station-house interrogation, he also has the prerogative to then and there answer questions, if that be his choice.'....To hold that a request for appointment of an attorney at arraignment would bar an investigating officer from later finding out if defendant wishes to exercise this prerogative would transform the Miranda safeguards ...'into wholly irrational obstacles to legitimate police investigative activity and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.' Michigan v Mosley, 423 US 96, 96 S.Ct. 321, 46 LEd 2d 313 (1975).

> Therefore, we hold that the request for an attorney at arraignment does not prevent subsequent station-house interrogation where the request at arraignment is not made in such a way as to effectively exercise the right to preclude any subsequent interrogation. (Emphasis added, 896.)

The above cases are pre-Edwards v Arizona, supra. Edwards itself was solely a Fifth Amendment case. (383, fn. 7).

In Edwards, supra, an arrest warrant had been issued upon a complaint having been lodged in the state court. Edwards was arrested and given his Miranda rights. He explicitly wanted to "make a deal" but only after first obtaining an attorney. Questioning stopped. The next day however, and prior to an attorney having consulted with him, the police came to see him and told him that "he had" to talk to them. He was again Mirandaized and confessed. The United States Supreme Court found that:

> If the accused indicates that he wishes to remain silent, 'the interrogation must cease.' If he requests counsel,

'the interrogation must cease until an attorney is present'.

Although a waiver of the right to first consult with an attorney is possible, that waiver must be shown to have been a voluntary, knowing, and intelligent relinquishment or abandonment of a known right or privilege. The determination of the existance of a waiver depends upon the particular facts and circumstances of the individual case. (385, citing Johnson v Zerbst, 304 US 458, 58 S.Ct 1019, 82 L Ed 1461 (1938).) In addressing the question of waiver, the Court held that:

> although...after initially being ad vised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation... the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused... having expressed his desire to deal with the

> police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. (386).

The analytical framework of Edwards is clear: where an accused has clearly "expressed his desire to deal with the police only through counsel", that counsel must be provided before interrogation continues or the defendant himself must re-initiate contact. The Edwards rule is of factual necessity a custodial interrogation rule which addresses only those situations where the defendant clearly does not want to talk to the police. As made clear in cases construing Edwards, supra, it did not create a per se rule of exclusion but required addressing the question of waiver in light of the facts of each case . Wyrick v Fields, 459 US 42, 103 S.Ct. 394, 74 L Ed 2d 214 (1982); Oregon v Bradshaw, ___ US ___, 103 S.Ct. ___, 77 L

Ed 2d 405 (1983), (the Edwards rule was a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers". (411).)

As stated in Smith v Illinois, 469 US ___, 105 S.Ct. ___, 83 L Ed 2d 488 (1984):

> This 'rigid' prophylactic rule...embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel....Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. (494).

At this point, the Smith court made reference to People v Krueger, 82 Ill 2d 305, 412 NE2d 537 (1980) and its language that not "every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel." In United States v Jardina, 747 F2d 945 (CA5-1984) the court noted that, "The word 'attorney' has no talismanic qualities.

A defendant does not invoke his right to counsel any time the word falls from his lips." (949).

The question that must initially be asked under Edwards is, did the accused invoke his right to counsel? If he did, were any subsequent communications initiated by him and, if so, did he validly waive his Fifth Amendment protections. Federal and state cases following Edwards began to mix its Fifth Amendment analysis with that relating to the Sixth Amendment, ultimately resulting in the decision of the Michigan Supreme Court now challenged.

In Jordan v Watkins, 681 F2d 1967 (CA5-1982). The defendant was arrested, transported to the local FBI office and advised of his Miranda rights. He stated that he understood his rights and made a confession during a second interrogation after again being advised of his rights. He was then arraigned

at which time the court inquired if he desired the appointment of counsel to which he responded "yes, at this time". (1071). He was returned to the local jail, photographed, and fingerprinted. During this booking procedure an investigator asked him if he would like to talk. The defendant, again advised of his Miranda rights, indicated he understood them, and gave a tape recorded statement substantially similar to that given earlier. At no point did Jordan ever request the presence of an attorney or express a desire that the questioning be stopped.

> In the instant case, Jordan never requested the assistance of counsel with respect to custodial interrogation; he merely told the judge that he would like appointed counsel to assist him in further judicial proceedings. In Edwards, the expressed desire to deal with the police only through counsel was made to the police during a custodial interrogation session. Unlike Edwards, Jordan never 'invoked his right to have counsel present during custodial interrogation' or 'expressed his desire to deal with the police only through counsel.' Moreover, he expressed no reluctance to speak with his

> interviewers, and he never attempted to cut off questioning. (1073).

After citing Blassingame, supra, the Court found Jordan's request for the appointment of counsel at the arraignment was "unrelated to the Fifth Amendment based right to confer with or have counsel present before answering any questions." (1074).

> Notwithstanding that Jordan did not invoke his right to counsel with respect to custodial interrogation ...the confession at issue would not have been admissible unless the state proved that Jordan waived his right to counsel, and that the waiver was voluntary, knowing and intelligent. An express written or oral statement of waiver of the Fifth Amendment right to remain silent or of the right to counsel is neither necessary nor always sufficient to establish that an accused's waiver was voluntary, knowing and intelligent.
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> * * *
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> Obviously, the validity of a waiver in any case must be determined by analyzing 'the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. (1074).

Jordan's waiver was found to be knowing, voluntary and intelligent. The Court stressed that:

> Prior to making the recorded confession, appellant had been advised of his Miranda rights at least four times.... [w]hen he was asked if he understood his rights during the second recorded interview session he responded, "Yes, I do."....[W]e must conclude that a waiver must be inferred from the appellant's actions and words. (1074).

Based on these factors, the Court found Jordan to have waived his Sixth Amendment right to counsel by the waiver of his Fifth Amendment rights. (1075). See also United States v Shaw, 701 F2d 367, 380 (CA5-1983); and Jardina, supra.

The Second Circuit in United States v Brown, 699 F2d 585 (CA2-1983) held inadmissible a statement taken from the defendant one hour after his indictment but an hour before his arraignment on the indictment and prior to defendant ever meeting with counsel or a waiver being shown. In Brown, supra, the defendant would have had "counsel appointed for him within the hour upon arraignment". (588). The Court cited to Mohabir, supra, and

found that although a waiver was possible, the government must meet a "heavy burden" establishing that waiver in accord with the "higher standard" applicable in Sixth Amendment situations. This "heavy burden" would not be met by simply showing that the Miranda warnings had been given. (590). This rule was given apparently a per se application.

The Fourth Circuit in United States v Clements, 713 F2d 1030 (CA4-1983) has held that where the Sixth Amendment right to counsel has attached to a defendant under indictment. Where that right has attached, a "stricter standard of review" must be used to determine if that right was waived than that standard used in the Fifth Amendment context. (1034). The Court cited to Satterfield, supra, and to Brown, supra, making the blanket (and amazing) statement that any police questioning after an indictment has been returned "is not legitimate investigation, but

[is] a species of discovery." (1034). Although not prohibiting such questioning, the Court held that it must comport with the dictates of the Sixth Amendment. To waive that right, it must be shown that "an accused was offered counsel but intelligently and understandingly rejected the offer." (1034):

> A valid waiver of Sixth Amendment counsel must be the voluntary act of the defendant free of coercion, physical or psychological, subtle or overt....The defendant must realize that his or her actions are a waiver of a constitutional privilege....Most importantly for this appeal, the defendant must know what constitutional right he or she is waiving, and possess some basic understanding of the meaning of that right. (1035).

The Court discussed the Second Circuits "strictest rule," compared it to the somewhat less emphatic rule of the First Circuit, and to the decisions of the Fifth Circuit which it found to be located "at the other end of the spectrum". (1035- 1036). The Fourth Circuit refused to adopt either the "strict" rule or that used by the Fifth Circuit, instead

holding that:

> in order for a waiver of Sixth Amendment counsel by an individual who has been indicted already to meet the constitutional requirements of knowledge and comprehension, that individual at a minimum must be informed that he or she is under indictment, unless the individual has actual or constructive knowledge of the indictment. (1036).

In United States v Campbell, 721 F2d 578 (CA6-1983), an indicted, arraigned defendant was given his Miranda rights and, notwithstanding that counsel had been appointed at his arraignment some "thirteen minutes" earlier, was interrogated and an incriminating statement obtained. The government argued that Jordan, supra, should control. The Sixth Circuit however held that under Edwards, there would have been an invalid waiver of the defendant's Fifth Amendment rights because the police initiated the communications that led to the confession. The question of whether a valid Fifth Amendment waiver could also act as a Sixth Amendment waiver was

never specifically addressed although the impression to be gained from the decision is that it might well be. In United States v Bentley, 726 F2d 1124 (CA6-1984) the court there found that Edwards, supra, "emphasiz[ed] the need that [the defendant] be shown to have made a knowing and intelligent waiver before his responses become admissible." (1127, 1128).

In Tinsley v Purvis, 731 F2d 791 (CA11-1984), the Court recognized that "[t]he Supreme court has applied the same standard for gauging waiver for both Fifth and Sixth Amendment rights." That standard was the one set forth in Johnson v Zerbst, supra, and followed in Brown, supra. The court recognized that "[o]ther circuits ...have suggested 'higher standards'", (794) and noted:

> In the abstract we cannot give meaning to the components of waiver: the knowing and voluntary relinquishment of the right to counsel. We can, with exacting scrutiny, test petitioner's conduct against this standard. (794).

The Seventh Circuit in Robinson v Percy, 738 F2d 214 (CA7-1984) decided in the same vein as Tinsley, supra, that it would "decline to impose a rigid test for determining when the accused validly has waived his Sixth Amendment right to counsel", holding that, "whether the accused has waived his Sixth Amendment right depends on the individual circumstances of each case." (222). In Robinson, as in the instant case, the defendant had been repeatedly given his Miranda warnings and had repeatedly waived them prior to giving the incriminating statement. The totality of the circumstances evidenced a clear intent to waive his Sixth Amendment rights.

In United States v Karr, 742 F2d 493 (CA9-1984), the Ninth Circuit noted that the arrested, Miranda-warned defendant" was familiar with the procedures" and "seemed eager to waive his rights to an attorney and to aid

the investigation." (495). Karr did not assert that the statements were involuntary but only that he did not specifically waive any Sixth Amendment right. The Court found, following Tinsley, supra, that the waiver standard under the Fifth and Sixth Amendments was the same. (495). The Court distinguished the strict rule of waiver found by the Second Circuit (Mohabir, supra), with the decisions of the Fifth and Sixth Circuits finding waiver where only Miranda warnings had been given (Jordan, supra; Brown, supra; Woods, supra), that of the Seventh Circuit applying a case-by-case approach (Robinson, supra, Tinsley, supra), and the "intermediate positions" taken by the First, Fourth, and Eighth Circuits (Payton, supra; Clements, supra; Fields v Wyrick, 706 F2d 879 (CA8-1983). The court ultimately held that the provision of Miranda warnings would suffice to establish a Sixth as well as a Fifth Amendment waiver. United

States v Mandley, 502 F2d 1103 (CA9-1974), and Coughlan v United States, 391 F2d 371 (CA9-1968). (496). The Petitioner submits that these last cases represent the more reasonable and correct stance.

STATE AUTHORITIES

State cases have also diverged on this question. In State v Wyer, 320 SE2d 92 (1984), the West Virginia Supreme Court held that a Sixth Amendment waiver should be judged by "stricter standards" than a Fifth Amendment waiver, "we do not equate a general request for counsel at the initial appearance before the magistrate as foreclosing in all cases the right of police officials to initiate a further discussion with the defendant to determine if he is willing to waive his Sixth Amendment right to counsel for purposes of procuring a confession." (105). The Court required, in addition to the standard Miranda warnings, a written waiver of the Sixth

Amendment right and a showing that the defendant was aware that he was under arrest and was informed of the nature of the charge against him.

The Supreme Court of Iowa in State v Johnson, 318 NW2d 417 (1982) found that the mere inquiry by a defendant after having been advised of his Miranda rights by interrogating police officers as to whether he should have an attorney did not equate to a request or for an assertion of his right to counsel. (430). Waiver was to be addressed on a case-by-case basis, here, the valid Fifth Amendment waiver also waived his Sixth Amendment right. See also Fryer v State, 325 NW2d 400 (Iowa-1982).

California courts have held that a defendant cannot waive the Sixth Amendment right by merely having been given and waived Miranda rights. People v Superior Court of Fresno County, 145 Cal.App 581, 194 Cal.Rptr. 523

(1983). New York, based on its state constitution requires that where a Sixth Amendment right has attached, counsel must actually meet with the accused before any waiver will be valid. People v Cunningham, 49 NYS2d 203 (1980), and People v Hobson, 384 NYS2d 419 (1976). Oregon relied on its own state constitution and followed the lead of New York, State v Sparklin, 672 P2d 1182 (1983). Montana, however, in State v Norgaard, 653 P2d 483 (1982), Rhode Island in State v Burbine, 451 A2d 22 (1982), Louisiana in State v Huntley, 425 SO2d 766 (1983) and State v Harper, 430 SO2d 627 (1983), Georgia in White v State, 310 SE2d 540 (1983) and Ross v State, -- SE2d --, 36 CrL 2413 (1985), Maine in State v Carter, 412 A2d 56 (1980), Illinois in People v Owens, 464 NE2d 261 (1984), North Carolina in State v Bauguss, 311 SE2d 248 (1984), Virginia in Johnson v Commonwealth, 255 SE2d 525 (1979), Later App., 273 SE2d 784

(1981), Cert. Den., 454 US 920, 102 S.Ct. 422, 70 L Ed2d 231 (1981), Delaware in Flamer v State, 490 A2d 104 (1983), and Wisconsin in Jordan v State, 287 NW2d 509 (1980), have found that Miranda warnings are sufficient in and of themselves to establish a Sixth Amendment waiver in a particular case.

All of which brings us to the decision of the Michigan Supreme Court. As noted above, the Court found that both Fifth and Sixth Amendment rights had attached to JACKSON, that JACKSON'S request for appointed counsel at the arraignment on the warrant triggered his Sixth Amendment rights, and that at no point did he "specifically request counsel for any subsequent interrogation.... [he] requested appointed counsel because [he was] financially incapable of retaining an attorney and [he was] unwilling to represent [himself]." (Bladel, at 53). The Court noted:

> Defendants never invoked their Fifth Amendment right to counsel before or during their post-arraignment interrogations. Furthermore, defendants knowingly and voluntarily waived their Miranda rights prior to their statements. (Appendix to Pet. for Cert., page 56).

Even so, the Michigan Court held that as the Sixth Amendment right to counsel was "considerably broader than its Fifth Amendment counterpart" and as neither the Michigan nor the United States Supreme Court had ever "delineated specific procedural requirements for waiver of the Sixth Amendment right", it would decide if the valid and repeated waiver of the Fifth Amendment by JACKSON also served to waive his Sixth Amendment protections. The court held that a "higher standard" for waiver was required than merely providing Miranda warnings. The Court criticized the various federal and state courts that held Miranda waivers sufficient on the basis that those courts allegedly did not sufficiently distinguish between the various constitutional

differences between the protections of the Fifth and Sixth Amendments. The Michigan "higher standard" for review of Sixth Amendment waivers however, could only be met by applying the Fifth Amendment rule of Edwards, supra, "by analogy". The Court went on to note that while judges and lawyers "may understand" the differences between Fifth and Sixth Amendment rights, "the average person does not". (App. to Cert. Pet., page 76). The Court held that "The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." (App. to Cert. Pet., page 77), and that he had made an "unequivocal request for counsel" at the arraignment on the warrant. (App. to Cert. Pet., page 86).

These conclusions are directly contradicted by JACKSON'S entire course of conduct from

the time of his arrest, through his attempts to mislead the police as to who the killer was, to his efforts to aid the police investigation by actively urging a co-defendant to confess so that the originator of the killing (the wife of the deceased) would not go free while the killers went to jail. JACKSON wanted to deal with the police directly. He was repeatedly advised of his Miranda rights and repeatedly waived them. He requested counsel at the arraignment on the warrant not to interfere with his on-going relationship with the police but solely to have appointed counsel at the examination and trial stages to attempt to work out a deal with the prosecutor. He simply and clearly never asserted, whether equivocally or unequivocally, any right to counsel during the interrogation process.

Further, the Michigan Court held that by interrogating JACKSON after he had been ar-

raigned on the warrant, the police "were attempting to strengthen their cases by conducting 'one last round' of interrogation before counsel arrived." (App. to Cert. Pet., page 85). This statement disregards the "undisputed" fact noted by Justice Boyle in dissent, that the post-arraignment statement "was a repetition of the verbal and written statement given on August 1 in which the defendant confessed that he was the shooter...". The opinion of the Court itself recognizes this fact. (App. to Cert. Pet., pages 95-96, 127). It must be noted that those earlier statements were taken prior to arraignment and after JACKSON had (as the Court repeatedly found) waived his Fifth Amendment rights.5

5: (Although the Court did in its opinion suppress the earlier two statements referred to by Justice Boyle due to a delay in arraignment, at the time the final statement

While cases relied on by the Michigan Court dealt with jurisdictions where a request for appointment of counsel at the arraignment would result in an appointment within "thirteen minutes" to "within the hour", that is not the situation that obtains in Michigan where counsel is appointed several days later. Brown, supra; Campbell, supra. (Joint Appendix, pages 24-26)

Although the Court noted that this was a major "murder for hire" case, it concluded that "[a]lthough the thoroughness with which the warrant request was prepared may be commendable...there was no need, for purposes of the arraignment, to determine whether Knight or defendant was telling the truth." The Court made this statement recognizing that

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5 was taken the police could not have known that the two statements on August 1 would, some five years later, be ordered suppressed. Thus, it is illogical and incorrect to assert that the final statement was taken solely to seek a "last round" advantage.)

the police were, attempting to "determine whether he [JACKSON] was telling the truth." (App. to Cert. Pet., pages 97-99). The investigation was clearly not concluded and yet, under the rule set forth, it could not continue. As held in Wyrick, supra, "The rule is simply an unjustifiable restriction on reasonable police questioning." (219)

Did this defendant know and waive his right to the assistance of counsel? Absolutely. He was told by the police of that right and waived that right at least seven times as the Michigan Supreme Court specifically found. He was also advised of that right by the arraigning magistrate and, although requesting counsel for trial, never requested or invoked the assistance of counsel during his contacts with the police.

Was this repeated warning-waiver cycle sufficient to cover both the Fifth and Sixth Amendment protections which had attached to

this defendant? Again, absolutely. He knew his rights, he knew he wanted to cooperate with the police, and he did actively and repeatedly cooperate with the police. His entire course of conduct, the specific facts of this case, evidences a knowing, voluntary and intentional relinquishment of his right to counsel. Johnson v Zerbst, supra; North Carolina v Butler, 441 US 369, 99 S.Ct. 1755, 60 L Ed2d 286, 293 (1979); Jurek v Estelle, 623 F2d 929, 939 (CA5-1980); Estelle v Smith, supra at 374, fn 16.

CONCLUSION AND RELIEF

The Petitioner recognizes that the right to counsel, whether based on the Fifth or Sixth Amendment, is a right jealously to be guarded and protected. The Petitioner also recognizes however, that those protections were not designed to operate in a manner to erect an impervious shield around an accused, impenetrable by the police and impervious to

justice. These rights were not designed to provide a convenient escape hatch whenever a defendant has been so unlucky as to have been caught.

The ultimate aim of JACKSON in his state appeal was to obtain a rule preventing any police-defendant interrogation, pre- or post-arraignment, unless an attorney were physically present. As noted by Chief Justice Burger in his concurrence in Edwards, supra, at 388:

> The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but, as with all 'good' things, they can be carried too far.

As noted in United States v Springer, 460 F2d 1344, 1348 fn 4 (CA7-1972):

> there can be no sound public policy requiring law enforcement and prosecutory agencies to affirmatively prevent or deter individuals from confessing that they have engaged in unlawful conduct.

In this case, the Michigan Supreme Court has however accomplished both of these non-

desired results. That court has not only adopted the "consistently... rejected...paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case" (Justice White concurring in Michigan v Mosley, 423 US 96, 96 S.Ct. 321, 46 L Ed2d 313 (1975), but has ruled in a manner that "transform[s] the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests" (opinion of Justice Stewart, Michigan v Mosely, supra at 320.)

Traditional concepts of waiver should control the question of Fifth or Sixth Amendment waivers of the right to counsel. A totality of the circumstances analysis should be employed to determine whether such a waiver has in fact been made. The judicially created Miranda warnings, which contain an explicit

and express advisement of the right to counsel, when provided to an accused and when knowingly, voluntarily and intelligently waived by him, should be seen as effectuating a valid waiver of the Sixth Amendment right to counsel.

Wherefore, the Petitioner respectfully requests that this Honorable Court reverse the decision of the Michigan Supreme Court below.

Respectfully submitted,

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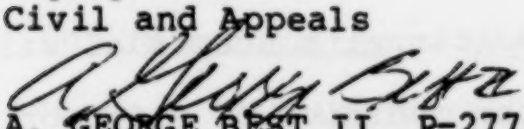

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